viz., of injury by the same act to two different articles belonging to the same person, only one action can be brought, seems entirely well settled: even though through ignorance or inadvertence the injury to the second chattel was not known to the plaintiff when the first suit was brought: *Folsom* v. *Clemence*, 119 Mass. 473; *Marble* v. *Keyes*, 9 Gray 221; *Bennett* v. *Hood*, 1 Allen 47; *Trask* v. *Hartford & New Haven Railroad Co.*, 2 Id. 331; *Herriter* v. *Porter*, 23 Cal. 385; *Braunenburgh* v. *Indianapolis Railroad Co.*, 13 Ind. 103; *Cumming* v. *Haines*, 5 Cal. 81.

If a man wrongly converts a thousand barrels of flour at one time, it would be monstrous to allow the owner to bring a thousand suits therefor: *Farrington* v. *Paine*, 15 Johns. 432. And see *O'Neal* v. *Brown*, 21 Ala. 482; *Hite* v. *Long*, 6 Rand. 457, and other cases.

And this is so even though the owner was prevented from including, in the first suit, all the articles taken or injured, by the fraudulent conduct of the defendant in refusing to allow him to examine the articles taken away in order to ascertain their number, or the amount of injury to each. The plaintiff in such case has only one "cause of action;" and the defendant does not attempt to conceal the *cause* of action, but only the extent and amount of the damage sustained by a well-known and understood cause. See *McCafferty* v. *Carter*, 125 Mass. 330.

And for a similar reason if A. steals several articles from B. at one and the same time, he cannot be twice convicted and punished on two indictments, one for each article stolen. See Whart. Cr. Pl. & Pr., sect. 470; Whart. Cr. Ev., sect. 588, and cases cited in notes.

So, in the other instance above given, of injury to two parts of one's person, his leg and his arm, by one and the same blow, or by successive blows at one and the same assault, it is equally clear that but one action could be sustained, although the extent of the injury might not have been known when the first suit was brought: *Fetter* v. *Beale*, 1 Salk. 11; *Whitney* v. *Clarendon*, 18 Vt. 252; *Howell* v. *Goodrich*, 69 Ill. 556; *Read* v. *Great Western Railway Co.*, L. R., 3 Q. B. 555.

Why then, in case of injury to one's person and property by one and the same transaction, at one and the same time, as in the principal case, should a person be allowed two suits? Is there more than one *cause* of action in such case any more than in the others, where two actions are not allowed? It certainly seems that the reasoning of COLERIDGE, C. J., in the principal case, is more in harmony with the established rules of law. And it should be noted that the opinion of POLLOCK, B., and LOPES, J., in the court below, 11 Q. B. 712, were on the same side, so that really the majority of those judges who have expressed opinions on the subject are against successive actions in such cases.

EDMUND H. BENNETT.

Boston.

RECENT AMERICAN DECISIONS.

Circuit Court, E. D. Arkansas.

SWANN v. SWANN.

Contracts made on the Lord's day are not void on religious or moral grounds, but upon the familiar and established doctrine that when a statute inflicts a penalty for doing an act—no matter what that act may be—a court of justice will not enforce a contract made in violation of such statute, and in the making of which

the parties to it incurred the prescribed penalty. A penalty implies a prohibition of the thing itself, on the doing of which the penalty is to accrue.

When, by the laws of a state, a large class of its citizens may lawfully labor and make contracts on the Lord's day, it is not, in a legal sense, against the public policy of such state, nor shocking to the moral sense of its people, for its courts to enforce a contract made on that day in another state, and valid by the law of that state.

A contract made on the Lord's day, and valid by the law of the state where made, will be enforced by the courts of another state, by the laws of which such contract would be void.

The only authentic and admissible evidence of the public policy of a state, on any given subject, are its constitution, laws and judicial decisions.

AT law.

Ratcliff & Fletcher, for plaintiff.

Clark & Williams, for defendant.

CALDWELL, J.—This suit is founded on a promissory note of which the defendant is the maker and the plaintiff the payee. The defence is that the note was executed on the Lord's day. The proof shows the note was executed on that day in the state of Tennessee, where the parties to it then resided, for the consideration of a valid pre-existing debt due from the defendant to the plaintiff. There is no place of payment fixed in the note.

In *Tucker* v. *West*, 29 Ark. 386, a note executed in this state on the Lord's day was held to be void under the statute. This court takes judicial notice of the laws of the several states: *Owings* v. *Hull*, 9 Pet. 607; *Railroad Co.* v. *Bank of Ashland*, 12 Wall. 226.

By the law of Tennessee, where the note was executed, it is a valid obligation. In *Amis* v. *Kyle*, 2 Yerg. 31, the Supreme Court held that the statute of that state only prohibited labor and business in the "ordinary calling" of the parties; and that isolated private contracts, made by parties outside of their ordinary calling, are not invalidated. This rule was carried to a great length in the case cited. An obligation, to be discharged in horses, was made payable on the Lord's day, and the court held the contract valid, and that a tender of the horses, to have the effect of discharging the obligation, must be made on that day. This was held upon the ground that the sale and delivery of horses was not the ordinary calling of either of the parties. The attention of the court has not been

called to any later exposition of the law of that state than is contained in this decision, and it will be assumed that there is none.

Under the rule established in *Amis* v. *Kyle*, it is obvious the note, which is the foundation of this suit, was valid in Tennessee. The execution of a note for a pre-existing debt was probably not the ordinary calling of either of the parties. If it was, the burden of proof was on the defendant to show it: *Roys* v. *Johnson*, 7 Gray 162; *Bloxsome* v. *Williams*, 3 B. & C. 232. The doctrine of the Supreme Court of Tennessee is the doctrine of the early English cases under the statute of 29 Chas. II. c. 7, which prohibited labor only in the "ordinary calling of the parties: *Drury* v. *Defontaine*, 1 Taunt. 131; *Bloxsome* v. *Williams*, *supra*; *Rex* v. *Whitnash*, 7 B. & C. 596; *Fennell* v. *Ridler*, 5 Id. 406; *Rex* v. *Brotherton*, 2 Strange 702. It is also the doctrine of some of the American cases: *Hellams* v. *Abercrombie*, 15 S. C. 110; *Bloom* v. *Richards*, 2 Ohio St. 387; *George* v. *George*, 47 N. H. 27; *Hazard* v. *Day*, 14 Allen 487. Of course, the law of this state has no extra-territorial operation, and cannot affect the validity of contracts executed elsewhere on the Lord's day. And the general rule is that a contract valid by the law of the place where it is made is valid everywhere, and will be enforced by the courts of every other country. But there are exceptions to this general rule, and among them contracts against good morals, and that tend to promote vice and crime, and contracts against the settled public policy of the state, will not be enforced, although they may be valid by the law of the place where they are made: Story on Confl. of Laws, § 244; Westl. Int. Law, § 196; Whart. Confl. Laws, § 490.

The contention of the learned counsel for the defendant is that a court of this state ought not to enforce a contract made on the Lord's day in another state, though valid by the law of that state, because the contract is the result of an immoral and irreligious act, and its enforcement here would shock the moral sense of the community and violate the public policy of the state. Assuming, but not deciding, that the determination of this question must be the same in this court that it would be in a court of the state, we will proceed to inquire whether there is any principle upon which a court of the state could refuse to enforce the contract in suit.

The common law made no distinction between the Lord's day and any other day. Contracts entered into on that day were as valid as those made on any other day. The contract in suit was volun-

tarily entered into, between parties capable of contracting, for a lawful and valuable consideration. It had relation to a subject-matter about which it was lawful to contract, and was a valid contract when and where it was made. No court ought to refuse its aid to enforce such a contract on doubtful and uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled public policy of this state, or injurious to the morals of its people. Vague surmises and flippant assertions as to what is the public policy of the state, or what would be shocking to the moral sense of its people, are not to be indulged in. The law points out the sources of information to which courts must appeal to determine the public policy of a state. The term, as it is often popularly used and defined, makes it an unknown and variable quantity, much too indefinite and uncertain to be made the foundation of a judgment. The only authentic and admissible evidence of the public policy of a state on any given subject are its constitution, laws and judicial decisions. The public policy of a state, of which courts take notice, and to which they give effect, must be deduced from these sources.

In *Vidal* v. *Girard's Ex'rs*, 2 How. 127, 198, it was objected by Mr. Webster that the foundation of the Girard College, upon the principles prescribed by the testator, was "derogatory and hostile to the Christian religion, and so is void as being against the common law and public policy of Pennsylvania." In replying to this argument the court said: "Nor are we at liberty to look at general considerations of the supposed public interests and policy of Pennsylvania upon this subject, beyond what its constitution and laws and judicial decisions make known to us." * * *

What is there, then, in the constitution, laws and decisions of this state evincing a public policy hostile to the enforcement of contracts lawfully made in other states on the Lord's day? The constitution of the state declares: "No human authority can, in any case or manner whatsoever, control or interfere with the right of conscience; and no preference shall ever be given by law to any religious establishment, denomination or mode of worship above any other. * * * No religious test shall ever be required of any person as a qualification to vote or hold office; nor shall any person be rendered incompetent to be a witness on account of his religious belief:" Const. 1874, §§ 24, 26.

So much of the statute of the state as has any bearing on this

question reads as follows: "Sect. 1614. Every person who shall, on the Sabbath or Sunday, be found laboring, or shall compel his apprentice or servant to labor or perform other services than customary household duties of daily necessity, comfort or charity, on conviction thereof shall be fined one dollar for each separate offence." * * * "Sect. 1617. Persons who are members of any religious society, who observe as Sabbath any other day of the week than the Christian Sabbath or Sunday, shall not be subject to the penalties of this act, so that they observe one day in seven, agreeably to the faith and practice of their church or society."

It is obvious the statute does not attempt to compel the observance of the first day of the week, as a day of rest, as a religious duty. It would be a nullity if it did so.

"In *Bloom* v. *Richards*, 2 Ohio St. 387, the court, THURMAN, J., delivering the opinion, said: "Thus the statute upon which the defendant relies, prohibiting common labor on the Sabbath, could not stand for a moment as a law of this state, if its sole foundation was the Christian duty of keeping that day holy, and its sole motive to enforce the observance of that duty."

And see, to the same effect, *Specht* v. *Commonwealth*, 8 Barr 312; *City Council of Charleston* v. *Benjamin*, 2 Strob. 508.

In this country legislative authority is limited strictly to temporal affairs by written constitutions. Under these constitutions there can be no mingling of the affairs of church and state by legislative authority. All religions are tolerated and none is established. Each has an equal right to the protection of the law, whether Christians, Jews or infidels: *Andrew* v. *Bible Society*, 4 Sandf. (N. Y.) 182; *Ayres* v. *Methodist Church*, 3 Id. 377; Cooley Const. Lim. 472. No citizen can be required by law to do, or refrain from doing, any act upon the sole ground that it is a religious duty. The old idea that religious faith and practice can be, and should be, propagated by physical force and penal statutes has no place in the American doctrine of government. Force can only effect external observances; whereas, religion consists in a temper of heart and conscious faith which force can neither implant nor efface. History records the mischievous consequences of all efforts to propagate religion, or alter man's relations to his Maker, by penal statutes. In religion no man is his neighbor's keeper, and no more is the state the keeper of the religious conscience of the people. The state protects all religions, but espouses none. Every man is

individually answerable to his God for his faith and his works, and must therefore be left free to imbibe and practice any faith he chooses, so long as he does not interfere with the rights of his neighbor. The statute, then, is not a religious regulation, but is the result of a legitimate exercise of the police power, and is itself a police regulation: *Slaughter-house Cases*, 16 Wall. 36, 62, and cases cited; *Bloom* v. *Richards*, *supra*; *Specht* v. *Commonwealth*, *supra*; *City of Charleston* v. *Benjamin*, *supra*.

Experience has shown the wisdom and necessity of having, at stated intervals, a day of rest from customary toil and labor for man and beast. It renews flagging energies, prevents premature decay, promotes the social virtues, tends to repress vice, aids and encourages religious teachings and practice, and affords an opportunity for innocent and healthful amusement and recreation. Neither man nor beast can stand the strain of constant and unremitting toil. Such a day, when designated by the state, is a civil and not a religious institution. No merely religious duty is enjoined. The statute does not require attendance on church, any more than it requires attendance to hear a lecture in support of infidelity. In point of lawfulness, there is no difference between an orthodox sermon and such a lecture on the Lord's day, in this state. The legislature might have required all persons to abstain from labor on the first or any other day of the week, without reference to their religious preferences or practices in that regard. But the statute of this state does not go to that length. While the law does not enforce religious duties and obligations as such, it has a tender regard for the conscience and convenience of every citizen in all matters relating to his religious faith and practice. The statute is catholic in its spirit, and accommodates itself to the varying religious faiths and practices of the people. In legal effect it declares every person must observe one day out of seven as a day of rest. But it does not attempt to bind all to the observance of the same day. Such a requirement would have the effect to compel many to observe two days of rest in each week, the statutory day and the day which their religious faith constrained them to observe. The statute designates the first day of the week as the day of rest for all who do not by reason of their religious faith and practice observe some other day. Christians, who regard the first day of the week as a sacred day; infidels, who regard no day as holy; and Friends, who hold there is no more holiness in one day than another, but

that all are to be kept holy, are by the statute constrained to desist from labor on the first day of the week. On the other hand, Jews and Seventh-day Baptists may pursue their ordinary callings on that day, if they observe the seventh day of the week according to their faith; and Mohammedans may labor on the first, if they observe the sixth day of the week according to their faith. The statute grants to all persons, who, in the exercise of their religious faith and practice, observe one day in the week as a day of rest, the liberty of working on every other day of the week, without qualification or limitation. In this respect there is a pronounced difference between the law of this and some of the other states.

In many other states but slight regard is shown to those who observe any other than the first day of the week as a day of rest. The New York statute provides: "Nor shall there be any servile working or laboring on that day, excepting works of necessity and charity, unless done by some person who uniformly keeps the last day of the week, called Saturday, as holy time, and does not labor or work on that day, and whose labor shall not disturb other persons in their observance of the first day of the week as holy time."

The New Jersey statute provides that it shall be a sufficient defence for working on the Sabbath day, that the defendant keeps the seventh day as the Sabbath: "provided, always, that the work or labor for which such person is informed against is done and performed in his or her dwelling-house or workshop, or on his or her premises or plantation, and that such work or labor has not disturbed other persons in the observance of the first day of the week as the Sabbath." And it has been held that whatever draws the attention of others from the appropriate duties of the Lord's day disturbs them. And where one purchased a horse and gave his note for the same, in his own house, in the presence of his wife, the seller, and one other person, whose religious feelings were not at all shocked, and who made no complaint, it was held to be "to the disturbance of others:" *Varney* v. *French*, 19 N. H. 233.

But the statute of this state draws no such invidious distinctions between those Christians who observe the first and those—be they Christians, Jews or Mohammedans—who observe "any other day of the week, * * * agreeably to the faith and practice of their church or society."

It is not true, therefore, that all contracts made in this state on the Lord's day are void. A large number of the citizens of the

state may lawfully labor and make contracts on that day. There can be no doubt of the validity of a note executed in this state on the Lord's day, when the parties to it refrain from labor on "any other day of the week, * * * agreeably to the faith and practice of their church or society." The validity of contracts made in this state on that day depends, therefore, on whether the parties to them conscientiously observe some other day of the week as a day of rest. If they do, their contracts made on the Lord's day are valid. Such contracts the courts of the state would be bound to enforce. If, then, it would be the duty of the courts of the state to enforce contracts made in the state between its own citizens on the Lord's day, having no relation to "household duties of daily necessity, comfort or charity," how can it be said that the public policy of the state forbids the enforcement of such contracts made in another state, and valid by the law of that state? A court cannot declare that the public policy of the state evinces such a high regard for the sacredness of the Lord's day as to forbid it to enforce a contract lawfully made on that day in another state, when it is bound by law to enforce contracts made on that day in its own state. It may be justifiable in private life to "assume a virtue, though you have it not;" but courts in the impartial administration of justice, are forbidden to assume a higher regard for the holiness of the Lord's day than is found in the constitution and laws of the state. To do so would deprive suitors of their rights without law, and would, besides, be in the highest degree pharisaical. And if the courts of the state would enforce contracts made on that day in the state between certain classes of her own citizens, how can the moral sense of the people of the state be said to be shocked by enforcing such contracts lawfully entered into elsewhere? No court is at liberty to impeach the constitution and laws under which it derives its jurisdiction and authority as a court, by assuming that what is lawful under them is shocking to the moral sense of the people who enacted them. But if no contracts made on that day in the state could be enforced, there would still be nothing in the objection that their enforcement would be too shocking to the moral sense of the community to be tolerated, for reasons forcibly stated by Judge REDFIELD, in delivering the opinion of the court in *Adams* v. *Gay*, 19 Vt. 358, 367: "And before we could determine that any given cause shocked the moral feelings of the community, we must be able to find but one pervading feeling upon that subject;

so much so, that a contrary feeling, in an individual, would denominate him either insane, or diseased in his moral perceptions. Now, nothing is more absurd to my mind, than to argue the existence of any such universal moral sentiment in regard to the observance of Sunday. It is in no just sense a moral sentiment at all which impels us to the observance of Sunday, for religious purposes, more than any other day. It is but education and habit, in the main certainly. Moral feeling might dictate the devotion of a portion of our time to religious rites and solemnities, but could never indicate any particular time above all others."

It is believed the moral sense of the community would esteem it a morally dishonest act for a debtor to refuse to pay a just debt because the evidence of it was executed on the Lord's day. Christians vary in their opinions of the manner in which the Lord's day ought to be kept. In continental Europe, sports, games and practices are freely indulged in on that day, with the approval of the church, which the larger number of Protestant churches of England and this country do not approve.

The large emigration from Europe to this country is having a marked influence on public opinion, particularly in towns and cities, as to how the Lord's day ought to be kept. The Puritan view of the question has undergone some modifications through this influence. As a result of less restricted views on the subject, in this city, in the shadow of the capitol there are more than half a hundred places where spirituous liquors are sold on Sunday, the same as any other day in the week, without molestation from the state or city authorities. It would be downright hypocrisy for a court to affect to believe that the moral sense of the community, which supports this condition of things, would be shocked by compelling a man to pay a note given for an honest debt because it was executed on the Lord's day. There may be a good many individuals who would feel so, but they do not constitute the community in the legal sense of that term.

It is an error to suppose that the Supreme Court of the state, in *Tucker* v. *West*, *supra*, held Lord's day contracts void on religious or moral grounds. That is not the ground upon which they are held void by any of the courts. The court held that the execution by the maker and the receipt by the payee of a promissory note was "labor," within the meaning of that word, as used in the statute.

It of course follows that the parties to a note executed on the

Lord's day incur the penalty of the statute against those who labor on that day, viz., a fine of one dollar. By reference to the statute it will be observed that it does not in terms prohibit labor, or declare contracts void. It simply denounces a penalty against those "found laboring." Here two familiar and established rules of decision come into play. One of these is, that a penalty implies a prohibition of the thing itself, on the doing of which the penalty is to accrue, though there are no prohibitory words in the statute; and the other is, that a court of justice will give no assistance to the enforcement of contracts which the law of the land has interdicted.

"The ground upon which courts have refused to maintain actions on contracts made in contravention of statutes for the observance of the Lord's day, is the elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction:" *Cranson* v. *Goss*, 107 Mass. 439; *Holman* v. *Johnson*, Cowp. 341; *Gibbs & Sterrett Manuf'g Co.* v. *Brucker*, 111 U. S. 597. There have been vigorous protests from time to time against the application of these principles to Lord's day contracts, upon the ground that they inflicted penalties, by judicial construction, out of all proportion to the offence, and not contemplated by the act (*Bloom* v. *Richards*, *supra*; and see remarks of GRIER, J., in *Philadelphia, W. & B. Railroad Co.* v. *Philadelphia & Havre de Grace S. B. Co.*, 23 How. 218); but the great weight of authority is that a contract made in violation of the Lord's day acts is void, like any other illegal and prohibited contract, and upon no other or different ground. And the reason that a contract made in this state on the Lord's day between persons "who observe as Sabbath any other day of the week" is not void, is that the statute expressly declares they "shall not be subject to the penalties of this act," and as there is no prohibition in terms in the statute, it results that there is neither penalty nor prohibition against such persons making contracts or performing any other kind of labor on the Lord's day. But if by the statute all contracts made in this state on the Lord's day were void, it is believed that the result in the case at bar would not be different.

There is often great difficulty in practice in drawing the line between the foreign contracts which may and may not be enforced. The rules defining the comity of states in this regard are necessarily general in their terms, and the adjudged cases are not quite uniform.

No case has been cited, and it is believed none can be found, holding that a contract made on the Lord's day in a state where such contracts are valid, will not be enforced by the courts of another state, by the laws of which such contracts are void. But there is one case at least (there may be others which our limited examination failed to discover) that holds that in such case the contract will be enforced. The case is entitled to consideration, no less on account of the uniform high character of the decisions of the court than the acknowledged learning and ability of the judge who delivered the opinion. In *Adams* v. *Gay*, *supra*, the precise question arose. A contract which, if it had been made in Vermont, would have been void under the Lord's day act of that state, was made in New Hampshire on the Lord's day. In a suit arising upon that contract in Vermont, the question arose whether the courts of that state would give it effect. The court refused to take judicial notice of the law of New Hampshire, and did not indulge the presumption that it was the same as that of Vermont. The court, Judge REDFIELD delivering the opinion, said: "The law of New Hampshire, then, being out of the case on account of its not having been proved at the trial, the contract between the parties is valid, unless it is void upon general principles of public policy, as being of evil example to our own citizens to see such a contract enforced in a court of justice."

And, after a full discussion of the subject, the court, on the assumption that the contract was valid in New Hampshire, held it valid in Vermont.

It has been decided that contracts for the purchase of lottery tickets, if valid where made, will be treated as valid and enforced in the courts of a state by the laws of which such contracts are illegal: *McIntyre* v. *Parks*, 3 Metc. 207; (in *Webster* v. *Munger*, 8 Gray 587, THOMAS, J., expresses the opinion that *McIntyre* v. *Parks*, was not rightly decided); *Kentucky* v. *Bassford*, 6 Hill 526. And the same doctrine has been maintained with reference to gambling contracts: Whart. Confl. Laws, §§ 487, 492.

This court is not to be understood as expressing any opinion as to the soundness of the doctrine of the cases last cited. They carry the doctrine of comity further than it is necessary to go to uphold the action in the case at bar. Lottery and gambling contracts are very generally regarded as inherently vicious and immoral, and wanting in a meritorious consideration, whenever and wherever

made. Whereas, the contract in suit was not only obligatory where made, but was made for a valuable and meritorious consideration; and the only objection to its validity is that it was executed on an inappropriate day of the week—a circumstance in which it would seem a state, other than that in which the contract was made, could have very little concern.

It has been held that when the law of the state where the contract was made, and the law of the state where the suit is brought, are the same, and a contract made on the Lord's day is void by the laws of both states, it will not be enforced; and that, in the absence of proof to the contrary, the law will be presumed to be the same in both states: *Hill* v. *Wilker*, 41 Ga. 449; *Sayre* v. *Wheeler*, 32 Iowa 559.

COMMON-LAW RULE.—As to the making of contracts, and all other acts not of a judicial nature, the common law made no distinction between Sunday and any other day: *Drury* v. *Defontaine*, 1 Taunt. 135; *Kepner* v. *Keefer*, 6 Watts 231; *Rex* v. *Brotherton*, Stra. 702; *Story* v. *Elliot*, 8 Cow. 27; *Fox* v. *Mensch*, 3 W. & S. 444; *Bloom* v. *Richards*, 2 Ohio St. 387; *Horace* v. *Keebler*, 5 Neb. 355; *Adams* v. *Gay*, 19 Vt. 365.

But in England and pretty generally in the United States, more or less stringent laws have been enacted, by which all ordinary labor and business are forbidden.

The principal English statute is that of 29 Car. II., c. 7, § 1. The language is: "that no tradesman, artificer, workman, laborer or other person whatsoever, shall do or exercise any worldly labor, business or work of their ordinary callings upon the Lord's Day, or any part thereof, (works of "necessity" and "charity" only excepted); and "that no person shall publicly cry, show forth, or expose to sale, any wares, merchandises, fruit, herbs, goods or chattels upon the Lord's Day or any part thereof." Very similar statutes have been enacted in this country.

WORKS OF NECESSITY AND CHARITY.—Works of "necessity" and "charity" are excepted from the operation of Sunday statutes. And by a work of "necessity," is not meant a physical and absolute necessity, but any labor, business or work, which is morally fit and proper to be done on that day, under the circumstances of the particular case is a case of "necessity" within the statute. *Flagg* v. *Inhabitants of Millbury*, 4 Cush. 243.

In *McGatrick* v. *Wason*, 4 Ohio St. 567, the court held that works of "necessity" are not limited to labor for the preservation of life, health or property from impending danger. The "necessity" may grow out of, or indeed be incident to the general course of business, or even be an exigiency of a particular trade or business, and yet be within the exception of the act. Thus the danger of navigation being closed, may make it lawful to load a vessel on Sunday, if there is no other time to do so.

The harvesting of "dead-ripe" wheat which could not be cut sooner, and which might be spoiled by rain if left until a later day, is a work of "necessity:" *Turner* v. *State*, 67 Ind. 595. A journey on Sunday to visit one's children who are properly away from home is not against the statute prohibiting travelling on that day: *McCeary* v.

Lowell, 44 Vt. 116; and a journey to procure medicine for a sick child is within the exception: *Gorman* v. *City of Lowell*, 117 Mass. 65.

Where a defect in a highway, for an injury occasioned by which to person or property the town would be liable, is found to exist on Sunday, it is the duty of such town to repair the defect immediately or to adopt measures to guard against the danger until such repairs can be made; and work, labor, or business for this work is "necessity" within the meaning of the statute: *Flagg* v. *Inhabitants of Millbury, supra;* see *Johnson* v. *Irasburg*, 47 Vt. 28. Raising subscriptions from a congregation on Sunday to pay off a church debt, or purchase a house of worship, is a work of "charity" within the statute, and subscriptions may be sustained: *Allen* v. *Duffie*, 43 Mich. 1; *Dale* v. *Knapp*, 98 Penn. St. 389.

A necessity may exist to work on Sunday to prevent a great waste of sap in making maple sugar: *Whitcomb* v. *Gilman*, 35 Vt. 297. The feeding of hogs on Sunday is a lawful work; and if, according to the circumstances of the particular case, the usual and proper means to feed, according to the practice of good husbandry, is to gather the necessary feed daily in the field, haul it to the feeding place and there feed it to them, such work is not unlawful: *Edgerton* v. *State*, 67 Ind. 588.

The running of passenger trains has been held a work of "necessity": *Commonwealth* v. *L. & N., &c., Ry. Co.*, 80 Ky. 291. And the forwarding of cattle by a railway company: *Phila., &c., Ry. Co.* v. *Lehman*, 56 Md. 209. See also *Commonwealth* v. *Sampson*, 97 Mass. 407; *Feital* v. *Middlesex Ry. Co.*, 109 Id. 398.

But the fact that one works gratuitously does not make it a work of "charity": *McGrath* v. *Merwin*, 112 Mass. 467. And in *State* v. *Goff*, 20 Ark. 289, it was held that where a person was too poor and had no implement of his own with which to cut his grain, which was wasting from over-ripeness, could borrow none till Saturday evening, had swapped work with his neighbors during the week, hired a man to cut his own grain Sunday, it was not a work of "necessity."

A person cannot lawfully travel on Sunday for the purpose of supplying fresh meat to marketmen whom his master has agreed to supply therewith; although he could not do this in addition to his other work on Monday morning, and his master by reason of illness is unable to do it himself: *Jones* v. *Inhabitants of Andover*, 10 Allen 18.

One who travels on Sunday to ascertain whether a house which he has hired and into which he intends to move the next day, has been cleaned, is not travelling from "necessity": *Smith* v. *Boston & M. Ry.*, 120 Mass. 490; s. c. 21 Am. Rep. 538.

The cleaning up of a wheelpit on Sunday for the purpose of preventing the stoppage on a week day of mills which employed many hands, is not a work of "necessity" or "charity": *McGrath* v. *Merwin, supra.* And where a contract of hire of a horse and carriage on Sunday was indefinite as to time, distance and use, the carrying of a young lady home who had been attending a religious meeting during the day, will not render the contract legal: *Tillock* v. *Webb*, 56 Me. 100; and see *Patt* v. *Wright*, 30 Ind. 476.

"ORDINARY CALLING," "BUSINESS," &c.—All of the English cases carefully distinguish between contracts which are of the "ordinary calling" of the parties, and such as are not in the "ordinary calling." The former made upon Sunday are void; the latter not. This distinction is based upon the words of the English statute of Charles II., which prohibits only work of one's "ordinary calling." And contracts not within this prohibition have always been held valid there: *Drury* v. *Defontaine*, 1

Taunt. 131; *Fennell* v. *Ridler*, 5 B. & C. 406. Where the statute merely prohibits the exercise of business or work of one's "ordinary calling," one party cannot sue on the contract made by him on Sunday in the exercise of his ordinary calling, even if it be not within the "ordinary calling" of the other, and the parties meet on that day at the request of the latter: *Hazard* v. *Day*, 14 Allen 487. But where the contract is made in the "ordinary calling" of one party, the other may sue if it was not within his own "ordinary calling," and he did not know, when he entered it, that it was within the "ordinary calling" of the defendant: *Bloxsome* v. *Williams*, 3 Barn. & C. 232; s. c. 1 C. & P. 294.

The party seeking to impeach a contract because made on Sunday, must show that it was done by a person in the exercise of the business of his "ordinary calling:" *Mills* v. *Williams*, 16 S. C. 593; *Hellams* v. *Abercombie*, 15 Id. 110.

Where a farmer, a part of whose ordinary business was the purchase and cultivation of land, bought a tract of land on Saturday and agreed to consummate the trade on the next day, by signing the necessary papers, and did sign a note for the purchase-money on that day; *held*, that the contract was illegal: *Morgan* v. *Bailey*, 59 Ga. 683.

The loaning of money on Sunday is "business," within the statute, and presumptively illegal: *Troewert* v. *Decker*, 51 Wis. 46. And the execution and delivery of a promissory note: *Allen* v. *Deming*, 14 N. H. 133.

Where a town board is authorized to issue bonds in aid of a railway, only upon the presentation of a petition therefor, signed by a certain number of taxpayers of the town, the procuring and affixing such signatures on Sunday, is "business" and is unlawful, and confers no authority upon the supervisors to issue bonds *De Forth* v. *Wis. &c., Ry.*, 52 Wis. 320.

But the execution of a mortgage is not the exercise of one's "ordinary calling:" *Hellams* v. *Abercombie*, 15 S. C. 110. Nor is an agreement by an attorney to settle a client's affairs, by which he incurs personal responsibility, his "ordinary calling:" *Peate* v. *Dicken*, 5 Tyr. 116; s. c. 3 Dowl. P. C. 171. And a contract of hiring between a farmer and a laborer for a year and a day is valid: *Rex* v. *Whitnash*, 7 Barn. & C. 596. And in *Scarfe* v. *Morgan*, 4 Mees. & W. 270, it was held, that where a mare was sent to a farmer to be covered by his stallion, the case was held not to be within the statute prohibiting the exercise of one's "ordinary calling."

The simple making of a contract is not embraced in the prohibition of "common labor:" *Horace* v. *Keebler*, 5 Neb. 358; *Johnson* v. *Brown*, 13 Kan. 529; *Bloom* v. *Richards*, 2 Ohio St. 388.

When Contract deemed made on Sunday.—In some of the New England States, Sunday, or the first day of the week, begins at sunset on Saturday evening and ends the same time the next day: 2 Bour. Dict. 559, 14th ed. In other parts of the United States, it commences at 12 o'clock on the night between Saturday and Sunday, and ends twenty-four hours later. See *Huidekoper* v. *Cotton*, 3 Watts (Pa.) 56; *Kilgor* v. *Miles*, 6 Gill & J. (Md.) 268.

In *Nason* v. *Dinsmore*, 34 Me. 391, it was held that a contract proved to have been made on Sunday is not thereby rendered invalid unless it be also proved that it was made before sunset. The presumption is that it was made on that part of the day on which it was lawful to do it: *Hiller* v. *English*, 4 Strobh. 486. In Connecticut, the Lord's day has been defined as continuing from daybreak to the closing of daylight on Sunday: *Fox* v. *Abel*, 2 Conn. 251; see, also, *Tracy* v. *Jenks*, 15 Pick. 465.

Where A. bought a quantity of shingles on Sunday, and at the same time gave a note for part payment, and he permitted the shingles to remain with the seller for

about a month, *Held*, that the contract was complete on Sunday, and void: *Allen* v. *Deming*, 14 N. H. 133.

A letter written Saturday, left by the writer on Sunday with a request to carry it to the post-office Monday, may be the medium of accepting a prior proposition from the person to whom it is addressed, and thus closing a lawful contract dating from Monday, the time when the letter was posted in pursuance of the Sunday request: *Bryant* v. *Booze*, 55 Ga. 439.

Where a contract for an exchange of horses, made on Saturday, included the discharge of a debt due from one of the parties to the other, but the purchaser of the horse took possession of it Sunday. *Held*, that there was such a consummation of the contract on Saturday as made it valid: *Peake* v. *Conlan*, 43 Iowa 297.

Where goods are selected and set apart and the prices agreed upon on Sunday, but, by the contract, they are not to be delivered till the next day, and they are not delivered till then, the transaction can not be avoided as a sale made on Sunday: *Rosenblatt* v. *Townsley*, 73 Mo. 536.

Payments made on Sunday and not returned, but allowed on a final accounting, will not avoid the contract on which they were received as one made in violation of the Sunday law: *Lamore* v. *Frisbie*, 42 Mich. 186.

What Contracts Void. — The ground upon which courts have refused to sustain actions on contracts made in contravention of statutes for the observance of Sunday, is the elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction: *Cranson* v. *Goss*, 107 Mass. 439; *Ellis* v. *Hammond*, 57 Ga. 179. Each party is *in pari delicto*, and no relief can be granted because it was made by one of them in the exercise of his common avocation: *Berry* v. *Planters' Bank*, 3 Tenn. Ch. 69.

In Kansas, a contract made on any day to perform any kind of labor on Sunday, works of necessity, &c., excepted, is void; but a contract made on Sunday to perform labor on any other day, is valid: *Johnson* v. *Brown*, 13 Kan. 529.

The owner cannot recover compensation for the use of a horse for a pleasure drive on Sunday: *Nodine* v. *Doherty*, 46 Barb. 59; *Stewart* v. *Davis*, 31 Ark. 518. In any case where the hiring is uncalled for, either by necessity or charity, the contract is void: *Whelden* v. *Chappel*, 8 R. I. 230; *Smith* v. *Rollins*, 11 Id. 464.

A common carrier's liability for carrying live stock is not lessened by reason of their being received or carried on Sunday: *Phila., &c., Ry.* v. *Lehman*, 56 Md. 209; see, also, *Opshal* v. *Judd*, 30 Minn. 126.

A contract for the sale and warranty of a horse on Sunday is void: *Fennell* v. *Ridler*, 5 B. & C. 405. And a loan of money on Sunday is void and cannot be enforced, whether in writing, verbal, or implied: *Meader* v. *White*, 66 Me. 90; *Finn* v. *Donahue*, 35 Conn. 216.

In *Day* v. *McAllister*, 15 Gray 433, it was held that a contract made in violation of the Sunday law is absolutely void.

A musician cannot recover for his services at a beer garden on Sunday: *Bernard* v. *Lüpping*, 32 Mo. 341.

An action will not lie for the conversion of a chattel, sold and delivered by the plaintiff to the defendant in exchange for another chattel on Sunday, and retained by defendant afterwards, notwithstanding the return by the plaintiff of the chattel for which it was exchanged and his demand for a corresponding return by defendant: *Myers* v. *Meinrath*, 101 Mass. 366.

The performance of any work on Sunday being expressly prohibited, any contract having for its consideration, or part of it, the doing of work on that day, cannot be enforced: *Slaxe* v. *Arnold*, 14

B. Mon. 287; see *Pate* v. *Wright*, 30 Ind. 476; *Sumner* v. *Jones*, 24 Vt. 317; *Smith* v. *Sparrow*, 4 Bing. 84.

Where there is a contract to publish an "ad." in the Sunday edition of a paper for a year, it will not be presumed that the contract contemplated any labor to be done on Sunday: *Sheffield* v. *Balmer*, 52 Mo. 474. See *Nason* v. *Dinsmore*, 34 Me. 391. But in *Smith* v. *Wilcox*, 25 Barb. 341, it was held that a contract to publish an "ad." in a paper issued on Sunday is an agreement to do an act prohibited by the statute relative to servile labor on that day, and the price cannot be recovered. This case was affirmed in 24 N. Y. 353. But under the laws of 1871, such contracts are now legal.

The rescission of a contract is as much a matter of business as the making of it, and is void: *Benedict* v. *Bachelder*, 24 Mich. 425; 9 Am. R. 130. See *Merritt* v. *Robinson*, 35 Ark. 483.

A city ordinance which gives Jews the privilege of trading on Sunday, but denies it to others, is unconstitutional: *City of Shreveport* v. *Levy*, 26 La. Ann. 671.

But in *Johns* v. *State*, 78 Ind. 332, it was held that a statute against the desecration of the Sabbath, which provides that "nothing herein contained shall be construed to affect such as conscientiously observe the seventh day of the week as Sabbath," is not unconstitutional, as granting certain citizens privileges, &c., which shall not belong to all persons.

Sunday contracts are void, and the burden of proof showing that the case falls within some of the exceptions of the statutes, is on the party claiming it: *Sayre* v. *Wheeler*, 32 Iowa 559. See *Albrecht* v. *State*, 8 Tex. App. 313. Two joined in one complaint for doing work on Sunday may be jointly convicted, upon proof of a joint act in violation of the statute: *Commonwealth* v. *Sampson*, 97 Mass. 407.

(For instances of negotiable paper, void because issued on Sunday, see subtitle "NEGOTIABLE PAPER," *infra*, p. 394.)

WHAT CONTRACTS VALID.—Where the contract is fully executed on Sunday, and the property passes, the sale is nevertheless valid: *Godfrey* v. *Greene*, 44 Me. 25.

A contract made on Sunday by the overseers of the town for the relief of a sick pauper, is valid: *Aldrich* v. *Inhabs. Blackstone*, 128 Mass. 148. And money paid on Sunday and retained afterwards, discharges debt: *Johnson* v. *Willis*, 7 Gray 164.

A deed though signed and acknowledged on Sunday, if delivered on another day is valid, whatever may be the effect on the acknowledgment: *Love* v. *Wells*, 25 Ind. 503.

A deed executed on Sunday cannot for that reason be avoided by a third party, who is a stranger to the transaction, claiming by a subsequent levy: *Greene* v. *Godfrey*, 44 Me. 25. And where a deed is executed on Sunday, but by the procurement of the grantor, dated upon the preceding day, he cannot assert the invalidity against a subsequent *bona fide* holder: *Love* v. *Wells*, *supra*.

In *Breitenman's Appeal*, 55 Penn. St. 183, it was held that any instrument which does not take effect till delivery is not void because signed on Sunday.

A will executed on Sunday is valid: *Bennett* v. *Brooks*, 9 Allen 118; *Breitenman's Appeal*, *supra*.

Bail-bond executed on Sunday is binding on the sureties: *Watts* v. *Commonwealth*, 5 Bush (Ky.) 309. And a bond void because issued on Sunday, may be used as an admission of a liability: *Lea* v. *Hopkins*, 7 Penn. St. 492.

An agreement to settle an action may be made on Sunday: *Shank* v. *Shoemaker*, 18 N. Y. 488. And the execution of a release by a creditor to an assignee, under a voluntary assignment, by delivery on Sunday is not void, not being labor, business or work of one's ordinary

calling: *Allen* v. *Gardiner*, 7 R. I. 22; see *Hazard* v. *Day*, 14 Allen 487; *Tucker* v. *West*, 29 Ark. 386.

A bill of sale of personal property, drawn and executed on Monday, is not void by reason of an account of stock having been taken on Sunday: *Luebbering* v. *Oberkoetter*, 1 Mo. App. 393.

And the fact that the indebtedness was for liquors sold on Sunday contrary to law, is no bar to an action on account stated, provided the account was not stated on Sunday: *Melchoir* v. *McCarty*, 31 Wis. 253.

The statute does not apply to the proceedings of business meetings of benevolent societies held on that day: *Corrigan* v. *Young Mens', &c., Society*, 65 Barb. 357.

A contract for the sale of property made upon Sunday, is not for that reason void. To bring a transaction within the statute which declares that no person shall expose for sale any wares, &c., on Sunday, clear proof of its violation must be produced. A private sale of property not "exposed to sale," is not within its provisions: *Eberle* v. *Mehrbach*, 55 N. Y. 682; see *Melvin* v. *Easly*, 42 N. C. 356.

If goods are sold and delivered to A. and B. on the Lord's day, the sale being induced by the false representations of A. on a previous day, and subsequently, not on Sunday, the seller demands the price of A., and he promises to pay it, this amounts to a sale to him, and he is liable for the price: *Winchell* v. *Carey*, 115 Mass. 560.

A contract for the transportation of property on Sunday is valid: *Merritt* v. *Earle*, 29 N. Y. 121; see *Carroll* v. *Staten Id. Ry. Co.*, 58 N. Y. 126.

In *Meriweather* v. *Smith*, 44 Ga. 542, the court said: "A clear distinction is made by the authorities between a suit to enforce a promise or undertaking entered into on Sunday, and a suit on a contract made on Sunday for work and labor, and for the doing anything, where the thing to be done is *afterwards* performed by the party. It would be a fraud in one who has received the consideration of a contract on a week day, to set up the invalidity of the contract because made on Sunday. He reaffirms the contract by receiving the consideration." See *Dickenson* v. *Richmond*, 97 Mass. 45; *Blood* v. *Bates*, 31 Vt. 147. In order to render the contract void, it must appear that the party seeking to enforce it, had some voluntary agency in consummating it on Sunday: *Sargeant* v. *Butts*, 21 Vt. 99.

In *Dinsmore* v. *N. Y. Board of Police*, 12 Abb. N. C. 436, an injunction was granted to restrain the board of police from interfering with an express company's transportation of freight between states of the United States, but denied as to domestic matters, that is as to goods to be received and delivered within the city of New York: See *Adams Express* v. *N. Y. Board Police*, 65 How. Pr. 72.

NEGOTIABLE PAPER — WHEN VOID. —A promissory note, made on Sunday, is, as between the original parties, void. *Pope* v. *Linn*, 50 Me. 83; *State Cap. Bank* v. *Thompson*, 42 N. H. 369; *Bank of C.* v. *Mayberry*, 48 Me. 198. But if delivered on another day, it is valid: *Goss* v. *Whitney*, 24 Vt. 187; *King* v. *Fleming*, 72 Ill. 21; *Hilton* v. *Houghton*, 35 Me. 143; *Bank of C.* v. *Mayberry*, *supra*. But in *Parker* v. *Pitts*, 73 Ind. 597, it was held that the execution of a promissory note, as surety on Sunday, though delivered by the principal on a week day to the payee, who had no knowledge that the note had been so signed by the surety is void. See *Chrisman* v. *Tuttle*, 59 Ind. 155; *Saltmarsh* v. *Tuthill*, 13 Ala. 390.

The consideration of a note given for an injury done on the Lord's day to a horse and carriage hired on that day for any purpose than that of necessity or charity, is unlawful: *Tillock* v. *Webb*, 56 Me. 100.

A note made on Sunday is not void at

common law, and in a suit on a foreign note, any foreign statute invalidating it must be proved: *O'Rourke* v. *O'Rourke*, 43 Mich. 59.

And a note executed on Sunday is good in the hands of an innocent holder before maturity: *State Cap. Bank* v. *Thompson*, *supra*. And a bill of exchange under like circumstances is valid: *Begbie* v. *Levi*, 1 C. & J. 180. And a note signed and delivered on Sunday, but dated on week day, is valid in the hands of a *bona fide* holder without notice of the defect: *Bank of C.* v. *Mayberry*, *supra*; *Knox* v. *Clifford*, 48 Wis. 651; *Cranson* v. *Goss*, 107 Mass. 439; *Vinton* v. *Peck*, 14 Mich. 287; *Ball* v. *Powers*, 62 Ga. 757. The making and delivering on a secular day of a promissory note, dated to take effect on a subsequent Sunday, is not work or labor prohibited by the statute: *Stacy* v. *Kemp*, 97 Mass. 166.

It is no ground for arresting judgment in an action on a promissory note, that it bears date on Sunday: *Hill* v. *Dunham*, 7 Gray 543; see *Stevens* v. *Wood*, 127 Mass. 123.

Subsequent Ratification. — The rule is that as between the parties a contract made in violation of the Sunday law, is void and is incapable of being ratified: *Pope* v. *Linn*, 50 Me. 83; *Day* v. *McAllister*, 15 Gray 433; *Stevens* v. *Wood*, 127 Mass. 123; see also *Parker* v. *Pitts*, 73 Ind. 598.

A contract for the transmission of a telegraph dispatch on Sunday is void, and the retention of the dispatch and the consideration paid by the sender does not constitute a ratification: *Rogers* v. *W. U. Tel. Co.*, 78 Ind. 169.

A Sunday horse trade can not be ratified on a week day; and if possession is given, the horse can be reclaimed, unless a new contract is made with mutual assent: *Winfield* v. *Dodge*, 45 Mich. 355. A note illegal because issued on Sunday is incapable of ratification: *Stevens* v. *Wood*, *supra*.

Part payments made on Sunday will not take a debt out of the statute of limitations: *Clapp* v. *Hale*, 112 Mass. 368. And a subsequent promise to pay a debt, whether express or implied if made on Sunday, does not take the debt out of the statute: *Bumgardner* v. *Taylor*, 28 Ala. 687. But *contra*, *Thomas* v. *Hunter*, 29 Md. 406; *Beardsley* v. *Hall*, 36 Conn. 270.

Where the terms of a contract only are agreed upon on Sunday, and subsequently executed it may be enforced: *Butler* v. *Lee*, 11 Ala. 885.

The mere fact that a person borrowing money retains and converts it to his own use, does not raise an implied promise binding in law. *Troewert* v. *Decker*, 51 Wis. 46. In *Bradley* v. *Rea*, 14 Allen 20, affirmed 103 Mass. 188, it was held that if a bargain is made on Sunday for the sale of goods, which are accordingly delivered and accepted by the purchaser on Monday, the vendor may maintain an action to recover the value of the goods, upon implied assumpsit; but the price fixed on Sunday will not be binding, nor will either be bound by any warranty made on that day. And in *Love* v. *Wells*, 25 Ind. 503, it was held that a contract void only because executed on Sunday constitutes an exception to the general rule that void contracts are not susceptible of ratification: *Sargeant* v. *Butts*, 21 Vt. 99. See *Van Hoven* v. *Irish*, 3 McCrary C. C. 443; *Heller* v. *Crawford*, 37 Ind. 279; *Melchoir* v. *McCarthy*, 31 Wis. 252.

Where a promissory note made by two, one of whom signed it on Sunday, was, on a subsequent day delivered by one of the makers to the payee who was ignorant of the fact that it had been signed on Sunday, it was held that such delivery was a subsequent ratification and made it valid: *King* v. *Fleming*, 72 Ill. 21. Where S. sold a horse to J. on Sunday, for which J. gave a note, and afterwards made two payments upon the note, and retained the horse without

offering to return the same, *Held* to amount to a ratification, and that S. was entitled to recover for the balance of the note: *Sumner* v. *Jones*, 24 Vt. 317. See also *Harrison* v. *Colton*, 31 Iowa 16; *Merrill* v. *Downs*, 41 N. H. 72.

TORT GROWING OUT OF SUNDAY CONTRACT.—The general principle is that courts of justice will not assist a person who has participated in a transaction forbidden by statute to assert rights growing out of it, or to relieve himself from the consequences of his own illegal act. Whether the form of action is in contract or in tort, the test in each case is whether, where all the parties are disclosed, the action appears to be founded in violation of law in which the plaintiff has taken part: *Hall* v. *Corcoran*, 107 Mass. 251. Thus, the sale or exchange of horses consummated on Sunday is void, and no action will lie on the warranty: *Finley* v. *Quirk*, 9 Minn. 195; *Murphy* v. *Simpson*, 14 B. Mon. 419; *Lyon* v. *Strong*, 6 Vt. 219; *Robeson* v. *French*, 12 Met. 24.

And a person who travels on Sunday in violation of the Lord's day act cannot maintain an action against a town for a defect in a highway, or against the proprietors of a street railway, in whose cars he is a passenger, for an injury to himself from their negligence, because his own fault in illegally travelling on the Lord's day necessarily contributed to the injury: *Bosworth* v. *Swansey*, 10 Met. 363; *Jones* v. *Andover*, 10 Allen 18; *Stanton* v. *Metropolitan Ry. Co.*, 14 Allen 485.

An action of tort will not lie, if to establish it the plaintiff requires aid from or is under the necessity of showing or depending upon an illegal Sunday contract: *Smith* v. *Rollins*, 11 R. I. 464; *Whelden* v. *Chappel*, 8 R. I. 230. And where the plaintiff sustained personal injuries from the negligence of the defendant while assisting them in their work on Sunday, it was held that his illegal act in working on Sunday was so inseparably connected with the cause of action, as to prevent his maintaining the suit: *McGrath* v. *Merwin*, 112 Mass. 467; see also *Ladd* v. *Rogers*, 11 Allen 209; *Simpson* v. *Nicholls*, 3 Mees. & W. 240; *Gunderson* v. *Richardson*, 56 Ia. 56.

And in *Gregg* v. *Wyman*, 4 Cush. 322, it was held that if the owner of a horse knowingly lets him, on the Lord's day, to be driven to a particular place, but not for "necessity or charity," and the hirer injures the horse by immoderate driving, the owner cannot maintain an action against him for such injuries, although occasioned in going to a different place, and beyond the limits specified in the contract. But the case of *Gregg* v. *Wyman*, was directly overruled in *Hall* v. *Corcoran*, 107 Mass. 251.

Said the court: "It appears to us, upon principal and authority, that an action of tort for the conversion of a horse, by driving it beyond the place agreed in the illegal contract of letting and hiring, is not founded on that contract. And we think that it is equally clear, that the contract need not be shown by the plaintiff, and forms no part of his cause of action. * * * The wrong committed by the defendants, for which they are now sued, was not a breach of the illegal contract by which the plaintiff put his property into their hands; nor is the ground of this action an abuse of the possession which they had thus acquired by his consent, but is a direct invasion of the plaintiff's general right of property, wholly outside of any contract between the parties by the wrongful driving of the horse beyond the place agreed upon, and thus assuming control of the property for their own benefit, without any authority or license from the owner." The doctrine of the above case is sustained by *Woodman* v. *Hubbard*, 25 N. H. 67; *Mortan* v. *Gloster*, 46 Me. 520. But in *Parker* v. *Latner*, 60 Id. 528; s. c. 11 Am. R. 210, it was held that an action will not lie to recover damages arising from the immoderate driving of a

horse during a pleasure drive on the Lord's day, for which he was hired.

But if the hirer of a horse injures the property, or suffers it to be injured through his negligence, the owner may recover, although the contract be void: *Nodine* v. *Doherty*, 46 Barb. 59; see *Merritt* v. *Earle*, 29 N. Y. 121; *Carroll* v. *Staten Id. Ry. Co.*, 58 N. Y. 126; *Bertholf* v. *O'Reilly*, 8 Hun 16; affirmed 18 Abb. L. J. 389; *Stewart* v. *Davis*, 31 Ark. 518; see also, *Dodson* v. *Harris*, 10 Ala. 566.

If a person while unlawfully travelling on Sunday is injured by a dog, the act of travelling is not a contributory cause of the injury, and he may recover: *White* v. *Lang*, 128 Mass. 598. And in *O'Shea* v. *Kohn*, a recent case in the New York Supreme Court, published in 17 Chicago Leg. News 15, Sept. 20, 1884, the court held that the law would not permit a person, by means of false representations, to obtain the goods or property of another and escape liability upon the fact that the wrong was perpetrated on Sunday.

CHARLES L. BILLINGS.

Chicago.

Supreme Court of California.

HAGERTY v. POWERS.

A parent who wilfully and negligently permits his son of eleven years of age to have in his possession a loaded pistol, whereby the boy injures the infant child of another, is not liable in damages therefor.

MYRICK, J., dissents.

IN banc. Appeal from the Superior Court of the county of Sacramento.

Grove L. Johnson and *Jones & Martin*, for appellant.

Elwood Bruner and *S. P. Scanaker*, for respondent.

The opinion of the court was delivered by

ROSS, J.—The question in this case is whether the defendant, who, according to the averments of the complaint, "wilfully, carelessly and negligently suffered, permitted, countenanced and allowed" his son of eleven years of age to have in his possession a loaded pistol, which pistol the boy afterwards so carelessly used and handled as to shoot the infant child of the plaintiff, is liable in damages therefor. We have been cited to no case, controlled by the principles of the common law, that holds that the action, under such circumstances, can be maintained. It seems, that under the civil law it may be; and such an action was lately sustained by the Supreme Court of Louisiana, in the case entitled *Marionneaux* v. *Brugier*, reported in the sixteenth volume of the Reporter, page

208. Pothier, in his work on Obligations, says: "The doctrine that fathers and others shall be responsible for the acts of children under their care, which it was in their power to prevent, appears highly reasonable; but I am not aware of any case in which it is adopted in the English law." Volume 2, page 34.

In *Tifft* v. *Tifft*, 4 Denio 177, a minor daughter of the defendant, in her father's absence, and without his authority or approval, wilfully set his dog, not ordinarily a vicious animal, upon the plaintiff's hog, which was bitten and killed; and the court held that the father was not, but the child was, liable in damages. To the same effect are a number of cases cited in Schouler, Dom. Rel. sect. 263, from which he deduces the rule that a father is not liable in damages for the torts of his child, committed without his knowledge, consent or sanction, and not in the course of his employment of the child.

Under this rule, it is quite clear that the averments of the complaint do not fix upon the defendant any liability for the damages suffered by the plaintiff. Judgment affirmed.

MYRICK, J., dissenting.—I dissent. As the complaint alleges that the father wilfully, carelessly and negligently countenanced his child in having the pistol, it is sufficient to show a cause of action.

The principal case is an interesting addition to the scanty literature upon the liability of the father for the torts of his minor children. The case of *Hoverson* v. *Noker*, Sup. Ct. of Wisconsin, 23 Am. L. Reg. (N. S.) 670, is somewhat similar in its facts. In this case the father was held liable for injuries received by the plaintiff, caused by the frightening of her horse by the two boys of the defendant, who shouted and fired pistols as she passed their father's premises. In order to connect the defendant with the acts of his sons it was held proper to show that such acts had often been done by the boys in the presence of their father prior to the day when the plaintiff was injured. In delivering the opinion of the court, TAYLOR, J., said: "If the father permitted his young sons to shout, use abusive language, and discharge fire-arms at persons who were passing along the highway in front of his house, he permitted that to be done upon his premises which in its nature was likely to result in damage to those passing; and when an injury did happen from that cause, he was not only morally but legally responsible for the damage done. If a parent permits his very young children to become a source of damage to those who pass the highway in front of his house, he is as much liable for the injury as though he permitted them to erect some frightful or dangerous object near the highway which would frighten passing teams; and in such case he cannot screen himself by saying that he did not in words order the erection to be made."

The case of *Beedy* v. *Reding*, 16 Me. 362, may be profitably consulted in this connection. In this case the minor sons of the defendant, being at the same time members of his family, with the defend-

ant's team hauled away the plaintiff's wood. "This (the court say) could hardly have been done without the defendant's knowledge, if it had not his approbation. It was his duty to have restrained them from trespassing on his neighbor's property. *Qui non prohibit cum prohibere possit, jubet.* And the maxim may be applied with great propriety to minor children residing with and under the control of their father." See, also, *Dunks* v. *Grey*, 3 Fed. Rep. 862, 864; also, *Morgan* v. *Thomas*, 8 Exch. 304, where the above maxim is quoted with approval by PARKE, B.

If the above cases are correct, the principal case can hardly be supported. The only way in which it can be distinguished, as it seems to us, is on the ground that the neglect of the parent was not the proximate cause of the damage sustained by plaintiff; but this distinction seems illusory. Although the damage was not perhaps a necessary consequence of the defendant's negligence, it was a natural consequence and one that any prudent man ought to have foreseen. If we concede the above maxim to be a correct statement of a legal principle; if it was the parent's duty to withhold from his infant son so dangerous a weapon, as would seem to be clear upon common-sense principles as well as established by the authorities above cited, then the conclusion seems obvious that he is responsible for the natural consequences of his omission to perform this duty. On principles of policy as well as upon legal principle, it would seem that the father ought to have been held to respond in damages in the principal case. Still the question is not free from difficulty, and perhaps it may finally be settled adversely to the opinion here expressed.

MARSHALL D. EWELL.

Chicago.

Supreme Court of Missouri.

ASKEW *v.* LA CYGNE EXCHANGE BANK ET AL.

A voluntary *bona fide* assignment of personal property, wherever situated, passes it to the assignee at the time of the assignment, and will have priority over subsequent lienors, provided it is not in conflict with some positive or customary law of the state where the property may be located.

The L. bank of the state of Kansas made an assignment in that state for the benefit of its creditors of all of its personal property to J. E. M., a resident of the same state, including a debt due to L. bank from M. bank of the state of Missouri, payable in the latter state. The assignment conformed with the laws of Kansas, and would have been valid had it been executed in Missouri—the assignment laws of the two states being substantially the same. H. A., a creditor of L. bank, and a citizen of Missouri, instituted an attachment suit against L. bank in the courts of the latter state, and garnisheed this debt in the hands of the M. bank. J. E. M., the assignee of the L. bank, interposed an interplea, claiming to be the owner of the debt. *Held*, that as between the attaching creditor and the assignee, the title of the latter would prevail.

THE opinion of the court was delivered by

EWING, Commissioner.—The appellant, on the 27th of February 1880, brought this suit against the La Cygne Bank, a banking corporation created under the laws of the state of Kansas, and there-

tofore doing business as such at La Cygne in that state. The suit was by attachment, and notice of garnishment was on the same day served on the Merchants' National Bank of Kansas City, as garnishee.

In due time the garnishee answered, stating that at the time the notice was served, it had in its possession the notes of several parties which had been placed in its hands by the Kansas bank as collateral security for a debt owing by the latter to the garnishee.

After this answer was filed the respondent, Moore, as assignee of the Kansas bank, filed his interplea claiming to be the owner of the notes, subject only to the lien of the pledge mentioned in the garnishee's answer.

The appellants answered to the interplea denying the claim set up.

The garnishee's answer was taken as true by all parties to the suit, and the contest between the appellants and respondent was over the surplus which it was supposed would remain in the hands of the garnishee after the payment of the debt due to it.

The issue between the interpleader and appellants was tried by the court, without a jury, upon the facts as agreed upon by the parties, and which were substantially as follows: The La Cygne Exchange Bank was a banking corporation organized under the laws of the state of Kansas, and had been doing business as such at La Cygne, in the county of Miami, in said state, since the year 1876. At noon, on February 25th 1880, the bank made an assignment of all its property and effects for the benefit of all its creditors. This assignment was made in conformity with the laws of the state of Kansas upon that subject. Immediately upon the making of the assignment the assignee took possession of the property and effects. The interpleader is the assignee, and undertook the execution of his trust, and all the proceedings of the assignee subsequent to the making of the assignment had been in strict conformity to the laws of the state of Kansas. The property attached in the garnishee's hands had been pledged to the garnishee bank by the debtor bank long before the assignment, as collateral security for certain debts due by the latter to the former. The appellants were residents and citizens of Missouri; the garnishee bank was located in Missouri, and the debt payable in Missouri.

The laws of the state of Kansas governing assignments for the

benefit of creditors were made part of the case, and were in all material matters substantially the same as those of Missouri upon the same subject.

The court refused to declare the law to be that upon the pleadings and evidence the interpleader could not recover, and made its finding for the assignee (the interpleader), and rendered judgment accordingly.

The attaching creditors took this appeal.

It will be seen that the precise legal proposition we have to decide is this: Does a voluntary assignment, for the benefit of all the creditors of the assignor, made in the state of Kansas, of a debt due from a citizen and resident of this state to the assignor, a resident of Kansas, pass the debt to the assignee at the time of the assignment, so as to defeat a subsequent attaching creditor of the assignor in this state, whose attachment is issued and the debtor of the assignor garnished, after the making of the assignment.

There has been much discussion of questions similar to this, but it will neither be necessary or profitable to undertake a thorough review of the conflicting adjudications.

The case of *Bryan* v. *Brisbin*, 26 Mo. 423, is similar to the one at bar, with the important exception that in that case the deed of assignment was in conflict with the laws of Missouri and could not have been enforced here; while it is admitted that the assignment in the case at bar would be valid in Missouri.

In *Einer* v. *Beste*, 32 Mo. 240, the plaintiff and defendant were both residents of Louisiana. The defendant was insolvent and had instituted proceedings for discharge under the insolvent laws of Louisiana. The plaintiff, by a suit of attachment in this state, sought to obtain priority of the other creditors. After a somewhat exhaustive review of the authorities, Judge BAY held that the assignment was good as against this attaching creditor. The same question was similarly decided by this court in *Thurston* v. *Rosenfield*, 42 Mo. 474.

In *Ockerman* v. *Cross*, 54 N. Y. 29, it is held that a voluntary assignment by a debtor residing in another state, valid by the laws of that state, and not in conflict with any law of New York, operates as an assignment of the debtor's property in New York, and the assignees can hold the same against attaching creditors of the debtor. See, also, to the same effect, 40 Barb. 465.

In *Speed* v. *May*, 17 Penn. St. 91, it was held that "a voluntary

assignment made by the owner in Maryland, who resided there, passed property in Pennsylvania to the assignee as against an attachment subsequent to the assignment."

The same question is similarly decided in *Hanford* v. *Paine*, 32 Vt. 442; *Gatewood* v. *Whitlock*, 9 Fla. 86; *Miller* v. *Kanaghan*, 56 Ga. 155; *Gregg* v. *Sloan*, 76 Va. 497; *Law* v. *Mills*, 18 Penn. St. 185; *Johnson* v. *Sharp*, 31 Ohio St. 611; *May* v. *Wannemacher*, 111 Mass. 202; *Caskie* v. *Webster*, 2 Wall. 131.

Mr. Justice STORY, in discussing the question (Story on Conflict of Laws, sect. 411) says: "There is a marked distinction between a voluntary conveyance by the owner, and a conveyance by mere operation of law, in cases of bankruptcy, *in invitum*. * * * In place of a voluntary conveyance of the owner, all that the legislature of a country can do, when justice requires it, is to assume the disposition of his property *in invitum*. But a statutable conveyance, made under the authority of any legislature, cannot operate on any property except that which is in its own territory. This makes a solid distinction between a voluntary conveyance of the owner, and an involuntary legal conveyance by the mere authority of law. The former has no relation to place, the latter on the contrary has the strictest relation to place." And he concludes by saying: "It is, therefore, admitted that a voluntary assignment by a party, according to the law of his domicile, will pass his personal estate, whatever may be its locality, abroad as well as at home. But it by no means follows that the same rule should govern in cases of assignment by operation of law." See note 2 to this section. Such an assignment would, if valid when made, be upheld in the state where the property is found, unless its operation is limited or restrained by some law or policy of the latter: *Hanford* v. *Paine, supra; Ockerman* v. *Cross, supra*. Burrill on Assignments, sects. 302 and 309, maintains the same general doctrine.

A contrary doctrine seems to prevail, according to some authorities cited by the appellant. One is the case of *Johnson* v. *Parker*, 67 Ky. 149, but that is virtually overruled by a much later decision (1884) in *Atherton* v. *Evers et al.*, 20 Fed. Rep. 894, where the general rule as referred to is maintained.

He also refers to other cases seemingly irreconcilable. But, notwithstanding, we think it may be assumed from the weight of authority that the true rule is, that *involuntary* assignments by operation of law do not operate beyond the territory of the state

under the laws of which such compulsory assignment may be made; but that *voluntary, bona fide* assignments of personal property, wherever situated, pass it to the assignee at the time of the assignment, and will have priority over subsequent leinors, provided it is not in conflict with some positive or customary law of the state where the property may be located.

It is admitted in this case that the assignment laws of Kansas and Missouri are substantially similar, and that the assignment under consideration would be valid if made in this state.

It also appears that the attaching creditor can claim no preference over the general creditors in point of merit.

We must therefore hold that the assignee will take the property in preference to the attaching creditor, and there is nothing in the law nor inter-state comity which would justify the courts of this state in holding otherwise.

The judgment below is therefore affirmed. All concur.

HOUGH, C. J.—Adopted as the opinion of the court and judgment will be entered accordingly.

Where the question involved in the principal case has presented itself, courts have adopted many conflicting and irreconcilable theories as to the principles which should govern their decisions. Many have held to the notion that in *all cases* the law of the domicile of the owner, *lex domicilii*, should control the disposition of *all* personal property, whether corporeal movables or choses in action, while others have maintained that the law of the place where the property is actually situated, *lex rei situs*, determined its transfer.

The rule that the law of the forum, *lex fori*, is the test of its validity, has been adopted in numerous cases. And in cases of debt another theory has been advanced, that is, that the law of the place of payment is the criterion, because that is where the debt will ultimately go. See Wharton on Conflict of Laws (2d ed.), § 359 *et seq.*; Story on Conflict of Laws (8th ed.), § *et seq.* 385 .; Burrill on Assignments (4th ed.), § 301 *et seq.*

As a general rule, personal property has no locality, no *situs*, but follows the person of the owner. It is, therefore, governed in its transfer or disposition by the law of the domicile of its owner, by the law of the place where the transfer is made, without regard to the locality where it may be actually situated, so that if a sale be valid where made, it is valid everywhere. 1 Kames's Eq., p. 355, c. 8, s. 3; Story on Conflict of Laws (8th ed.), p. 546. Though this is not a universal rule, but subject to certain well-founded exceptions. The question depends largely upon the manner of the transfer, the nature of the property and the effect upon the rights of citizens in the place where the property is situated. One exception to the rule is, that an assignment is not valid of property in another state, as against citizens of that state, if it is repugnant to the policy or positive institutions of such other state. This exception rests on the ground that there is no comity which requires a state to enforce transfers which are detrimental to her own citizens. The cases generally

sustain this exception, yet, as will be seen, a few repudiate it, because of the narrow and illiberal policy which it is supposed supports it. 2 Kent Com. 455. *Caskie* v. *Webster*, 2 Wall. Jr. 131, does not sustain the exception. This case states the law to be, that the legal *situs* of movables follows the domicile of the owner, and that the law of the actual *situs* protects the claims of creditors domiciled there only against transfers by operation of law. In *Caskie* v. *Webster*, the assignment was made in Virginia, by a citizen of that state. The transfer was good by the laws of Virginia, and included a debt as one item of his property due to the assignor from a citizen of Pennsylvania. Tested by the laws of Pennsylvania, the assignment was invalid. Before the assignee could collect this debt, a Pennsylvania creditor of the assignor attached it. It was held that the assignment effectually transferred the debt to the assignee. GRIER, J., in giving the opinion, said: A debt is a mere incorporeal right. It has no *situs*, and follows the person of the creditor. A voluntary assignment of it by the creditor, which is valid by the laws of his domicile, * * * will operate as a transfer of the debt, which should be regarded in all places. In America, bankrupt or insolvent assignments by operation of law, have not been considered as subject to this rule. But I know of no other established exception to the general rule, that a transfer of personal property, valid by the laws of the owner's domicile, is valid everywhere. I know there are some cases to be found in which the courts of some states of this union have decided that a voluntary assignment for the benefit of creditors, valid by the laws of the creditor's domicile, will be disregarded where it is prejudicial to the interests of the attaching creditors in other states, or invalid by the laws of the state where the debt or the property is attached."

Speed v. *May*, 17 Penn. St. 91, is likewise against sustaining the exception. The assignment was voluntary, and made in Maryland, by a citizen of Maryland, and good by the laws of that state. It included a debt due from a citizen of Pennsylvania to the assignor. This debt was attached by a Pennsylvania creditor of the assignor before the assignee got possession of it. GIBSON, C. J., who gave the opinion, said: "The legal *situs* follows the domicile of the owner, and the law of the actual *situs* protects the claims of domiciled creditors there only against transfer by operation of law. * * * Granting, for the sake of argument, that the actual *situs* of the debt in question was in Pennsylvania, the voluntary assignment of it in Maryland, by the owner of it, vested it in the trustees there against their creditors here. The assignment was as operative to transfer the property in the first instance, as it would have been had it been executed by a citizen of Pennsylvania." In answer to the objection that the assignment should not be sustained because it did not conform to the laws of Pennsylvania, the chief justice observed: "The legal presumption is, that it was intended to be performed at the place where it was made; and, as there is nothing to rebut it, the law of the contract is the law of the place of its origin. * * * The *lex loci contractus* determines the validity of the contract; the *lex fori* controls the remedy." See *Law* v. *Mills*, 18 Penn. St. 185. From the language of the court in the preceding decisions it will be seen that the rule declared is, that the legal *situs* of personal property follows the domicile of the owner, and determines the validity of the assignment, except where the transfer is made by operation of law. Nor do these decisions rest upon the distinction between mere *choses in action* and *corporeal movables*, as claimed in *Guillander* v. *Howell*, 35 N. Y. 675. But if the for-

eign assignment is repugnant to the legislation of the state where the property is situated it will not be sustained: *Philson* v. *Barnes*, 50 Penn. St. 230. In this case the assignment was made in Maryland, and included a debt due from a resident of Pennsylvania to the assignor. The debt was attached before the assignee got possession of it. The statute of Pennsylvania required such assignments to be recorded and notice to be given. This was not done. The court held as the assignment contravened the policy of the statute it could not be sustained against an attachment of one of its own citizens. There seems to be no conflict in the cases on this proposition. If a foreign assignment, though valid, in the owner's domicile where made, of either corporeal movables or choses in action, is repugnant to the positive legislation of the state where the property is situated, there is no good reason why it should be sustained, if it is prejudicial to the interests of citizens of the latter state. To uphold it would be to ignore the public policy of the state as evinced by the legislature. Mr. Justice PORTER clearly states the reasons for this rule in the leading case of *Oliver* v. *Townes*, 2 Mart. N. S. (La.) 93, 102. See, further *Norris* v. *Mumford*, 4 Mart. O. S. 20; *Durnford* v. *Brooks*, 3 Id. 222, 225; *Ramsey* v. *Stevenson*, 5 Id. 23; *Fisk* v. *Chandler*, 7 Id. 24. Mr. Justice STORY, in referring to this principle, says that no one can seriously doubt that it is competent for any state to adopt such a rule in its own legislation, since it has perfect jurisdiction over all property, personal as well as real, within its own territorial limits. Nor can such a rule, made for the benefit of innocent purchasers and creditors, be deemed justly open to the reproach of being founded in a narrow or selfish policy. "But how far," continued Judge STORY, "any court of justice ought, upon its own general authority, to impose such a limitation, *independently of positive legislation*, has been thought to admit of more serious question, since the doctrine which it unfolds aims a direct blow at the soundness of the policy on which the general rule that personal property has no locality, is itself founded:" Story on Confl. of Laws (8th ed.), § 390. See section 380 of Story on Conflict of Laws, where Lord LOUGHBOROUGH is quoted as saying: "It is a clear proposition, not only of the law of England, but of every country in the world where law has the semblance of science, that personal property has no locality; the meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or by the act of the party, it follows the law of the person." See *Freke* v. *Carbery*, L. R., 16 Eq. 466, where Lord SELBORNE declares that the above passage is simply a translation into English of the maxim *mobilia sequuntur personam*. Lord C. J. ABBOTT'S views seem to accord fully with those of Lord LOUGHBOROUGH, as above given, for he says: "Personal property has no locality, and even with respect to that, it is not correct to say that the law of England gives way to the law of a foreign country, but that it is a part of the law of England that personal property should be distributed according to the *jus domicilii*:" *Birthwhistle* v. *Vardill*, 5 B. & C. 438, 451; s. c. 9 Bligh 32–88; 2 Cl. & F. 571. For further authority on the general proposition, see Story on Conflict of Laws (8th ed.), § 380 *et seq.*, and notes.

But whatever may be urged against the soundness of the exception to the general rule, it has been admitted, in terms, by so many jurists, that its existence as part of the law cannot well be denied. The states adhere to the principle for the purpose of protecting their own citizens; it is never invoked for the benefit of citizens of other states.

And whether the conflict is with a statutory enactment, or contravenes the public policy as reflected by the judiciary, it is not easy to perceive a distinction.

Chief Justice REDFIELD, in *Hanford* v. *Paine*, 32 Vt. 442, admitted the general rule to be that, if good, according to the laws of the owner's domicile, they will have the effect to pass all the personal property of the assignor wherever situated, "unless their operation is limited or restrained by some local law or policy of the state where the same is situated." See *Richmondville Mfg. Co.* v. *Prall*, 9 Conn. 487; *Sanderson* v. *Bradford*, 10 N. H. 260; *Atwood* v. *Protection Ins. Co.*, 14 Conn. 555.

The Massachusetts courts have, in many instances, repudiated the notion of giving effect to such assignments where they operate against their local legislation, or to defeat attachments made by their own citizens: *Zipcey* v. *Thompson*, 1 Gray 243; *Carter* v. *Sibley*, 4 Met. 298; *Edwards* v. *Mitchell*, 1 Gray 239; *Ingraham* v. *Geyer*, 13 Mass. 146. This case was followed in *Fox* v. *Adams*, 5 Greenleaf (Me.) 245; *Means* v. *Hapgood*, 19 Pick. 107. But Chief Justice SHAW, in giving the opinion in the last case referred to, (*Fox* v. *Adams*, *supra*), thus: "This case has been repeatedly doubted in this state." See further, *Taylor* v. *Columbia Ins. Co.*, 14 Allen (Mass.) 353; *Osborn* v. *Adams*, 18 Pick. 245; *Fall River Iron Works* v. *Croade*, 15 Id. 11; *Bradford* v. *Tappan*, 11 Id. 76; *Ward* v. *Lamson*, 6 Id. 358; *Swan* v. *Crafts*, 124 Mass. 453; *May* v. *Wannemacher*, 111 Id. 202. In *Pierce* v. *O'Brien*, 129 Mass. 314, COLT, J., said: "An assignment made by the debtor himself in another state, which, if made here, would be set aside for want of consideration, will not be sustained against an attachment by a Massachusetts creditor, although valid in the place where made. There is no comity which requires us to give force to laws of another state which directly conflict with the laws of our own, or to allow to the act of the debtor resident in another state an effect in disposing of his property, as against his creditors here, which it would not have if he lived in Massachusetts." See further, *Andrews* v. *Herriot*, 4 Cow. 510; *LeRoy* v. *Crowninshield*, 2 Mason 157; *Bishop* v. *Holcomb*, 10 Conn. 444; 2 Kent's Com. 407 *et seq.*; *Sill* v. *Worswick*, 1 Hen. Bl. 693; *Philips* v. *Hunter*, 2 Id. 405; *Lemmon* v. *People*, 20 N. Y. 602; *Hoyt* v. *Thompson*, 19 Id. 226; *People* v. *Com. of Taxes*, 23 Id. 224; *Edgerly* v. *Bush*, 81 Id. 199, 206.

Freen v. *Van Buskirk*, 7 Wall. (74 U. S.) 139, is an interesting case. The facts were: A citizen of New York being indebted to B., a citizen of the same state, mortgaged certain personal chattels which he had in Illinois to B. Two days after, and before the mortgage could be recorded in Illinois, or the property delivered, both being necessary by the law of Illinois (though not by the laws of New York), to the validity of the mortgage, C., to whom A. was also indebted, and who was also a citizen of New York, attached the property which A. had mortgaged to B. in the state of Illinois. B. then brought suit in New York against C. for converting the chattel. C. pleaded in bar the proceedings in attachment in Illinois. The New York courts held that the question whether B. had property in the chattels on the day of attachment was to be determined by the law of the domicile of the parties, and as by the New York laws B. took title to the property the moment the mortgage was executed, the attachment in Illinois was not a bar. The United States Supreme Court reversed this decision, and held that the laws of Illinois governed as to B.'s property in the chattels on the day of the attachment. This case is reaffirmed in *Hervey* v. *R. I. Locomotive Works*, 93 U. S. (3 Otto) 664; see *Clark* v. *Tar-*

bell, 58 N. H. 88; *Danner* v. *Brewer*, 69 Ala. 191.

In *Varnum* v. *Camp*, 1 Green (N. J.) 326, it was held that a general assignment, made in a foreign jurisdiction by a debtor in favor of his creditors, was not valid so as to pass title to the personal effects of the debtor situated within the state of New Jersey as against the creditors of the assignor, if it contravened the essential provisions of the statute of New Jersey regulating such assignments. The fact that the transfer was valid by the laws of debtor's domicile would not render effectual property subject to New Jersey laws. This case was affirmed in *Moore* v. *Bonnell*, 31 N. J. L. (2 Vroom) 90, 94. In *Bentley* v. *Whittemore*, 19 N. J. Eq. 462, the Chief Justice, in commenting on *Varnum* v. *Camp*, *supra*, said: "The ground of decision in that case was, that we had established in this state a local policy under which our citizens had a right to be protected. It was admitted that, as a general rule, a transfer of property valid where made, would be effectual everywhere; but it was also deemed equally clear that the recognised exception to the rule was that it was not to be enforced to the manifest injury of our own citizens. A state cannot be required, thus it was argued, by any of the obligations of comity, to give up its own system, and substitute in lieu of its any part of the social arrangement of a foreign jurisdiction. This limitation, as well as the rule itself, is firmly established as a part of our international law."

Mr. Justice CORBIN, in *Andrews* v. *Herriot*, 4 Cow. (N. Y.) 510, admitted the general rule to be that the *lex loci contractus* governed, but "with the exception of cases in which the contract is immoral or unjust, or in which the enforcing it in a state would be injurious to the rights, the interests or convenience of such state or citizens."

In *Bryan* v. *Brisbin*, 26 Mo. 423, the assignment was made in Minnesota, and made preferences, and was valid by Minnesota laws, but such preferences were invalid by laws of Missouri. It was held that this assignment would not operate against an attaching resident creditor of the assignor in the Missouri courts. The court said: "We are asked to enforce an assignment, which could not be made and enforced if made in this state, as it must and will be by the laws of Minnesota, in opposition to the claims of a creditor resident here, who has attached the property previous to any notice of assignment. It is not understood that comity requires a court to enforce a contract valid according to the laws of the place where the contract is made, if such enforcement would be attended with manifest injustice to the claims of the citizens of the county where the property is located and where the claim is asserted. Justice must not be sacrificed to courtesy. It is very obvious that if we hold the assignment to prevail over the attachment, we make a discrimination *against* our own citizens. * * * There is no principle of comity which requires us to go this far." See *Brown* v. *Knox*, 6 Mo. 302, 306; *Johnson* v. *Parker*, 4 Bush (Ky.) 149.

Mr. Justice DAVIS, in *Green* v. *Van Buskirk*, 38 How. Pr. 60, truly stated the doctrine of the weight of authority, when he said that there is no absolute right to have such transfers respected, that it is only on principles of comity that it is allowed; "and this principle of comity," remarked he, "always yields when the laws and policy of the state where the property is located have prescribed a different rule of transfer from that of the state where the owner lives."

In referring to Judge STORY'S statement that personal property is governed by the law of domicile, SARGENT, J., in *Dunlap* v. *Rogers*, 47 N. H. 287, observed: "But whatever weight the English or early New York authorities might otherwise have been entitled to,

the great weight of American authority is now the other way; and it may be considered as part of the settled jurisprudence of this country, that personal property, *as against creditors*, has locality, and the *lex loci rei sitæ* prevails over the law of the domicile with regard to the rule of preferences in the case of insolvent estates. The laws of other governments have no force beyond their territorial limits; and if permitted to operate in other states it is upon principles of comity, and only when neither the state nor its citizens would suffer any inconvenience from the application of the foreign law."

Distinction between Debts and Movables.—There has been a distinction taken in some cases as to the *situs* between debts and movables—the latter being capable of having a *situs* not the former—as they follow the domicile of the owner: *People* v. *Com. of Texas*, 23 N. Y. 224. Mr. Justice PECKHAM, in *Guillander* v. *Howell*, 35 N. Y. 657, said *Speed* v. *May*, *supra*, and *Caskie* v. *Webster*, *supra*, were sound law, because of this distinction. But, as above observed, neither of those cases were put upon this distinction, but upon the simple principle that a voluntary assignment of movables, valid where made, is valid everywhere. Yet in both those cases the items in controversy were debts. Mr. Justice PECKHAM, in the case *supra*, in speaking of this distinction, said: "A chose in action cannot be surely said to have any actual *situs* in the place where the debtor resides. As a general principle it is payable at the residence of the creditor if not otherwise expressed, and a tender to be good must be made to the creditor. There would seem, therefore, to be no sound basis for the debtor's state to legislate exclusively as to the legality of the transfer of that debt made by a foreign creditor. In such cases, as in all others where the property transferred does not actually lie within the jurisdiction of another government, a sale or a contract valid where made is valid everywhere."

And in speaking of another Maryland case, Mr. Justice PECKHAM said: "The Supreme Court in the third district, at general term, in *Thurman* v. *Stockwell*, lately held, that the exception did not extend to a debt due from a resident in Connecticut to a resident of this state, but that an assignment thereof valid here, though invalid there by her laws, ought to be valid there also, even as against residents of Connecticut, because a debt is not a *corpus* capable of local position, but merely a *jus incorporeal*."

In *Howard Nat. Bank* v. *King*, 10 Abb. (N. Y.) N. Cases 346, the New York Supreme Court, in referring to this question said: "The rule in regard to personal property that it has no *situs*, but that it follows the person of the owner, is elementary. As a corollary from that rule, it follows that personal property is governed in its transfer and disposition by the law of the domicile of its owner, that is, by the law of the place where the sale is made, so that if a sale or other transfer be valid where made, it is valid everywhere." After admitting the exception that the transfer is invalid in another state in which the property is actually situated, if it conflicts with the laws of that state, and pronouncing it logically inconsistent with the above rule and corollary, the court continued: "From an examination of the authorities in the light of the rule, I am of opinion that the exception affects only movable property, and does not operate upon credits or other choses in action held by the person who makes the assignment or transfer, and that in so far as they are concerned, they are governed by the general rules above mentioned, and that they have no *situs* apart from the domicile of their owner, and if a transfer of them be made in the state in which the owner is domiciled, which is valid there, it is effectual everywhere."

But in *Pilson* v. *Barnes*, 50 Penn. St. 230, it was expressly held that a debt had a *situs*, inasmuch as a foreign assignment could not transfer it in the domicile of the debtor if it contravenes some positive legislative enactment. See, also, *Paine* v. *Lester*, 44 Conn. 196. But see *Noble* v. *Smith*, 6 R. I. 446; *Mowry* v. *Crocker*, 6 Wis. 326; *Smith* v. *Ch. & N. W. Railroad Co.*, 23 Id. 267; *Fuller* v. *Steiglitz*, 27 Ohio St. 355.

Question between Foreign Parties.—It has been repeatedly held, by an almost unbroken line of authorities, that where the question of extra-territorial property arises between a foreign assignee and a foreign creditor, the laws where the assignment was made will determine its validity: *Van Buskirk* v. *Warren*, 39 N. Y. 119; *Abraham* v. *Plestoro*, 3 Wend. 540; *Plestoro* v. *Abraham*, 1 Paige 236; *May* v. *Wannemacher*, 111 Mass. 202; *Whipple* v. *Thayer*, 16 Pick. 25; *Kidder* v. *Tufts*, 48 N. H. 125; *Hall* v. *Boardman*, 14 Id. 38; *Dunlap* v. *Rogers*, 47 Id. 287; *Smith* v. *Brown*, 43 Id. 44; *Richardson* v. *Forepaugh*, 7 Gray 546; *R. I. Bank* v. *Danforth*, 14 Id. 123; *Bank of U. S.* v. *Lee*, 13 Peters 107; s. c. 5 Cranch C. C. 319; *Crapo* v. *Kelly*, 16 Wall. 610; *Pond* v. *Cooke*, 45 Conn. 132; *Dehon* v. *Foster*, 4 Allen (Mass.) 545; *Burlock* v. *Taylor*, 16 Pick. (Mass.) 335.

In *Einer* v. *Beste*, 32 Mo. 240, the parties were all citizens of Louisiana. The assignment was made in that state and good there. It operated upon all of the debtor's property, some of which was in Missouri. One of the creditors of the assignor, resident of Louisiana, attached property in Missouri. It was held that the assignee's right to the property would prevail over the non-resident attaching creditor.

Thurston v. *Rosenfield*, 42 Mo. 474, affirms the principle of this last case. In that case the parties were all residents of New York and New Jersey. The debtor made a voluntary assignment of his effects in New York for the benefit of his creditors, in which certain of them were preferred. The assignment included certain real estate situated in Missouri. It was valid by New York laws, but would have been void if made in Missouri. The plaintiff attached the debtor's Missouri property. It was held that the attachment suit could not be maintained. The court affirmed the general principle that a foreign assignment, made directly in opposition to their legislation, should never have the effect of giving an advantage to non-resident creditors to the injury of their own citizens. "But," said the court, "as this case presents no such question, we think comity requires and justice will be subserved by holding the assignment good according to the laws of the place where executed. See *First National Bank* v. *Hughes*, 10 Mo. App. 7, 22, where it was held that a deed of assignment of land, void where made, but valid by laws of Missouri, would effectually pass title to land in Missouri, against an attachment upon such land at the suit of a citizen of a third state. See *State Bank Receiver* v. *Plainfield Bank*, 34 N. J. Eq. 450.

In *Bently* v. *Whittemore*, 19 N. J. Eq. 432, the assignment was made in New York between New York parties and good there. It was sought to be attacked in the courts of New Jersey, in so far as it operated upon property within that state, by a non-resident, because it was invalid by New Jersey laws. Mr. Justice BEARDSLY, in giving the opinion, said: "Upon what principle can a citizen of another state ask us to refuse to recognise the validity of an assignment made in the state of New York and in conformity to her laws? Upon what plea consistent with comity, under such circumstances, are the authorities of this government to repudiate a transaction valid by the laws of a sister state? If the question touched one of our own citizens, we could vindicate our rejection of such transaction on

the ground of our statute, passed legitimately, for the special regulation of the affairs of such citizen. But if such a rejection relates to the citizens of another state, how is such a line of conduct to be justified? We might, indeed, urge, as a sort of excuse, that the laws of New York regulating assignments were not similar to the laws of this state, and that we preferred the regulations of our law. * * * But I cannot think we have a right to endeavor to arbitrate in such a concern. * * * The true rule of law and public policy is this: "That a voluntary assignment made abroad, inconsistent in substantial respects with our statutes, should not be put in execution here to the detriment of our own citizens, but that, for all other purposes, if valid by the *lex loci*, it should be carried fully into effect." So, in *Whipple* v. *Thayer*, 16 Pick. 25, this rule is well illustrated. The parties were all citizens of Rhode Island, where the deed of assignment was made and operated to convey property in Massachusetts. It conformed to Rhode Island laws, but not with the laws of Massachusetts. A Rhode Island citizen attached a portion of the property in Massachusetts. The title of the assignee was held to prevail. *Burlock* v. *Taylor*, 16 Pick. 335, and *Daniels* v. *Willard*, Id. 36, hold likewise.

In *Atwood* v. *Protection Ins. Co.*, 14 Conn. 555, the subject of controversy was a debt due from a company in Connecticut to a citizen of Ohio. The assignment, made in Ohio and good there, transferred this debt to the assignee, also a citizen of Ohio, but it did not conform to Connecticut laws. A Pennsylvania citizen attached this debt in Connecticut. It was held that the assignment effectually passed the debt. See further, *Richardson* v. *Leavitt*, 1 La. Ann. 430. *Bholen* v. *Cleveland*, 5 Mason 174, is an instructive case on this subject. The courts of New Hampshire have announced this rule: *Sanderson* v. *Bradford*, 10 N. H. 260.

But *Paine* v. *Lester*, 44 Conn. 196, does not seem to harmonize with the above cases. The case makes no distinction between citizens of Connecticut and citizens of sister states. The facts were: A corporation of Pennsylvania made an assignment for the benefit of its creditors in that state, and which was valid there. One item included a debt due from a citizen of Connecticut. The transfer was not good by laws of Connecticut. After assignment a citizen of Rhode Island attached the debt in Connecticut. The attachment was held to prevail. In this case it was said (p. 204): "The citizens of all our sister states have, by the Constitution of the United States, the same privileges with our own citizens, and any one of them who has availed himself of the legal remedies furnished by our laws, to secure payment of a debt due him, has the same claim to the assistance of our courts that one of our own citizens would have." But the doctrine of this case is exceptional.

In *Rhode Island Bank* v. *Danforth*, 14 Gray (Mass.) 123, the Massachusetts Supreme Court said: "An execution has sometimes been made in favor of creditors residing in Massachusetts, and who had made attachments here which were sought to be avoided by an assignment or transfer in another state to secure creditors. But this is not the case here; all the parties are citizens of Rhode Island, and a valid mortgage there may transfer the property in Massachusetts."

Actual Change of Possession.—If there is an actual change of possession, the transfer is good everywhere, yet it has been held by some cases, that this change must conform to the laws of the place where the property is situated: *Koster* v. *Merritt*, 32 Conn. 246; *Mead* v. *Dayton*, 28 Id. 33; *Chafee* v. *Fourth National Bank*, 71 Me. 514; *Forbes* v. *Scannell*, 13 Cal. 241; *Philson* v. *Barnes*, 50 Pa. St. 230; *Hanford* v. *Paine*, 32 Vt. 442;

Rice v. *Curtis*, 32 Vt. 460, 464. Thus, in the last case, the assignment was made in New York and valid, but not in conformity to the laws of Vermont, where the property was situated. The assignee took actual possession. It was held the title of the assignee was not effectual. And in *Philson* v. *Barnes*, 50 Pa. St. 230, the assignment contract was made in Maryland, and operated on property in Pennsylvania. It was valid in Maryland, but not in conformity with the laws of Pennsylvania, because not recorded in the county where the property was located. The property was attached by a Pennsylvania citizen, and his title was sustained. But in *Ockerman* v. *Cross*, 54 N. Y. 29, a different rule was laid down. The assignment was executed in Canada, and valid there, but not in compliance with the laws of New York, because not "prepared, acknowledged and recorded." The assignee got possession of the property. It was held that the assignee's title to the property was complete. And a like ruling is made by the Supreme Court of California, in *Forbes* v. *Scannell*, 13 Cal. 242. The property was located in California, and owned by citizens of the United States residing and doing business in Canton, China. The assignment was executed in China, but was not good by the laws of California. The assignee took actual possession, and his title was held good. BALDWIN, J., in giving the opinion, said (p. 277): "The truth is, we do not consider this question as one of comity at all. It is a pure question of property. By our general laws we recognise the duty of government to protect property, and that is, property which is acquired by contract, lawful and effectual to pass title in the place where it is made. It might as well be said, that if a man made his money by usury in California, and carried it into Pennsylvania, the courts of that state would refuse to recognise his right, because usury is against the policy of Pennsylvania. Or if won at cards, in Mexico, where no law exists against gaming, it would cease to be his property whenever brought into this state."

Transfer Valid by Lex loci Contractus and Lex fori.—If the assignment is good by the laws of the state of the assignor's domicile where the assignment is made, and also valid where the property is situated, it will be upheld as against an attaching creditor in the courts of the latter state. *Miller* v. *Kernaghan*, 56 Ga. 155. In answer to the contention that the domestic tribunals will hold assets against foreign assignment, the court said: "Certainly this would be done if the assignment were not comformable to our own laws, but there would be no inconsistency in recognising the assignment as perfectly valid here, and then refusing to yield to it. There may be decisions in other states or countries on that erratic line, but we are sure sound principle is the other way, and so we believe is the weight of authority. * * * An assignment, whether foreign or domestic, that presents no conflict with any law, is to have full effect on all assets to which its terms apply." This case fully accords with the principal case. And it was held, in *Ockerman* v. *Cross*, 54 N. Y. 29, that such an assignment, not invalidated by any law of New York, would pass title of personal property of the debtor, situated in that state, to the assignee. To same effect, see *Walker* v. *Whitlock*, 9 Fla. 87, 103. After reviewing the authorities, the court said: "This assignment being a *voluntary* one, by deed, formal and irrevocable, containing no provisions repugnant to our laws, nor to the policy and positive institutions of this state, and there being nothing to prohibit the assignors, who are citizens of other states, from a free disposal of their personal property situated here, we must, upon the principles of comity between sister states, hold the assignment valid here, and that it operated at its execution to vest the title in the assignee and divested all the interest of the as-